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By Hand Delivery

July 31, 2008

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Jeff Jordan
Office of the General Counsel
Federal Election Commission
999 E Street, NW,
Washington, DC 20463

RE: In re The Loeffler Group, LLP, MUR No. 6023

Dear Jeff:

I have enclosed the Response of The Loeffler Group, LLP to the allegations in MUR 6023. As explained in the Respondent's Motion to Submit Response Under Seal, we request the Commission rule on the Respondent's three motions before opening, reviewing, or analyzing the enclosed Response.

The Respondent has submitted three motions: A Motion to Sever, A Motion to Dismiss and a Motion to Keep its Response Under Seal.

1. The Respondent first requests the Commission grant its Motion to Sever the allegations against The Loeffler Group from the rest of the Complaint.
2. The Respondent next requests the Commission grant its Motion to Dismiss this matter because the Complaint does not meet statutory requirements to initiate an enforcement case.
3. The Respondent then submits a Motion to Keep its Response Under Seal until the first two Motions have been considered.

We believe it would be unnecessary and prejudicial to the Respondent for the Commission to open, review, or analyze the Respondent's Response to the merits of the Complaint before addressing the Motions to Sever and Dismiss. Thus, we have submitted the Respondent's substantive Response in a sealed envelope and request that the Commission not

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open, review, or analyze it unless the Commission determines that dismissal is not justified on the grounds in the Respondent's Motion to Dismiss.

Please confirm your receipt of this letter and the enclosed documents by delivering a file-stamped copy of this letter to the messenger.

If you have any questions, please call me at (202) 775-5791.

Best regards,

A handwritten signature in black ink, appearing to read "Craig Engle", written over the typed name.

Craig Engle

cc: Tom Loeffler, Esq.
Leonard O. Evans III, Esq.

Enclosures: Motion to Sever
Motion to Dismiss
Motion to Submit Response Under Seal
Response (Submitted Under Seal)

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BEFORE THE FEDERAL ELECTION COMMISSION

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COUNSEL

2008 AUG -4 P 4:21

In re:

The Loeffler Group

MUR No. 6023

RESPONSE

From August 2007 to May 2008, Susan Nelson received severance and consulting payments from The Loeffler Group for providing it with her professional advisory and consulting services. This money was paid to her in the ordinary course of The Loeffler Group's business for bona fide work being done. This money was paid to her irrespective of any work she was doing for the McCain Campaign. The payments ended in May 2008 because the McCain Campaign made a political, not legal, decision to not allow any campaign staff to also maintain part-time positions with any lobbying firms.

Accordingly, the Commission should find no reason to believe The Loeffler Group violated any provision of the Federal Election Campaign Act on the basis of allegations asserted in the Complaint.

Introduction to Case

On May 17, 2008, *Newsweek* published a short story by Michael Isikoff based completely on anonymous sources stating The Loeffler Group "started paying \$15,000 a month last summer to one of its lobbyists, Susan Nelson, after

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she left to become McCain's full-time finance director" and that in "February or March', Loeffler rehired Nelson as a consultant to 'help him with his clients' while she continued on the McCain payroll." (Attachment 1)

The story also reported the McCain Campaign recently instituted a sweeping new conflict of interest policy. (Attachment 2) The policy stated that no person working for the McCain Campaign may be a registered lobbyist or foreign agent, or receive compensation for such activity. Shortly after this policy was put in place, Mr. Loeffler terminated his consulting contract with Nelson.

From, *and only from*, this news story's anonymous sources, this complaint was filed alleging The Loeffler Group was subsidizing Nelson's campaign salary in violation of FEC laws and regulations.

The full facts of this matter and longstanding FEC precedent indicate just the opposite: Nelson was paid bona fide salaries for bona fide work being done for the McCain Campaign and The Loeffler Group consistent with precedent in FEC Advisory Opinions.

Summary of Facts

Rather than attempting to correct all the factual inaccuracies in the *Newsweek* article and Complaint,¹ the following facts are submitted and sworn to in the attached Affidavit of Mr. Loeffler.

¹ One misstatement in the Complaint does need to be addressed. The Complaint states "it is curious that the campaign's national finance director would be moonlighting for her past employer." In Respondent's Counsel's 25 years experience, it is not curious but is in fact quite typical that political consultants have numerous jobs for numerous clients at the same time.

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The Loeffler Group, LLP (the "Firm") is a law firm primarily providing clients with professional representation regarding federal and state government relation and international trade matters. It was founded by Tom Loeffler, who previously served as a Member of the U.S. House of Representatives for eight years. Susan Nelson, a highly respected professional fundraiser and political affairs consultant was a Principal at the Firm from August 2005 through July 2007.

Nelson provided the Firm and its clients a range of professional consulting services concerning complex federal and state government relations matters. In 2007, she was a registered lobbyist for certain clients. Nelson was compensated for her work based on a variety of factors unrelated to the amount of time, or billable hours, she spent on a particular client. Some of the factors affecting her compensation were her seniority and status within the Firm, her problem-solving skills, and particularly her value as a "round-the-clock" advisor and counsel to the Firm and its clients. Loeffler determined Nelson's compensation using these factors and others based on his long experience as an employer with knowledge of the true value of a person's professional services.

Both Loeffler and Nelson have been long-time supporters of Senator John McCain. During the first half of 2007, Loeffler was increasingly involved in the John McCain 2008 presidential campaign ("McCain Campaign") while Nelson occasionally volunteered for it. At the same time, Loeffler also had to maintain

his responsibility to the Firm and its clients, and he relied heavily on Nelson to accomplish that.

During the second half of 2007 both Loeffler and Nelson became fully involved in the McCain Campaign but also spent numerous hours attending to the Firm and its business. Also during that time, three other key members of the Firm resigned to take other job opportunities.

In the first months of 2008, Loeffler and Nelson continued their work on the McCain Campaign and Nelson continued helping Loeffler with his responsibilities to serve the Firm's clients. In May 2008, however, the McCain Campaign issued a general policy related to all campaign personnel prohibiting all campaign staff from also engaging in lobbying activities. In light of the new policy, Loeffler stepped down from the McCain Campaign and chose to return his full attention to the Firm. Nelson chose to remain with the McCain Campaign and no longer consults with Loeffler on Firm matters.

1. January - June 2007

In early 2007, Loeffler assumed the volunteer role of National Campaign Co-chairman and National Finance Chairman for the McCain Campaign. Taking on those new challenges meant Loeffler began to focus more time and attention on the McCain Campaign while still having to maintain his responsibilities to the Firm and its clients. He increasingly looked to Nelson to help him maintain those Firm and client responsibilities.

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2. July - December 2007

As FEC disclosure reports and news stories demonstrate, the McCain Campaign was having fundraising and political difficulty in the late summer and fall of 2007. Accordingly, the McCain Campaign asked Nelson to join the campaign's paid staff as its Finance Director. Consequently, on July 31, 2007, Nelson severed her full-time employment relationship with the Firm. The Firm, however, asked Nelson to continue providing it with advice and professional consulting services to ensure continuity for many clients and ongoing issues. After seeking and obtaining the advice of FEC counsel by memorandum dated August 5, 2007, the Firm signed a severance agreement with Nelson. Pursuant to the severance agreement, Nelson was paid an amount less than her previous, full-time salary. Nelson was paid an amount and on terms in the ordinary course of my business, which is consistent with FEC precedent.

Between August and December 2007, Nelson was frequently providing Loeffler with advice on many ongoing government relations matters. Loeffler and Nelson may have had more than 100 conversations about the Firm's business during that time. In fact, Loeffler began to rely on her more and more heavily since three other key personnel had recently departed the Firm. Nevertheless, because Nelson was an employee of the McCain Campaign, she no longer provided government affairs services directly to Firm clients and she was de-listed as a lobbyist for all clients on the Firm's 2007 year-end LDA reports.

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Fortunately, between October and December 2007, as Loeffler and Nelson focused more attention on the McCain Campaign, its fundraising began to improve, as the McCain Campaign's FEC financial disclosure reports for the last quarter of 2007 show. Unfortunately, Nelson's consulting work for the Firm pursuant to the severance agreement was ending in 2007. Due to the departures of other senior personnel at the Firm, Loeffler thought it was necessary to consider extending Nelson's consulting arrangement into 2008.

3. January - May 2008

In January 2008, when Nelson's severance period ended, Loeffler entered into a consulting arrangement with Nelson to continue receiving her important advisory services. Because this was similar to the services she provided from August to December 2007, they entered into a consulting agreement dated January 31, 2008, with payments identical to the severance payments in 2007. This new consulting agreement between the Firm and Nelson was reviewed and approved by FEC counsel at the McCain Campaign. The consulting agreement was entered into and carried out in the ordinary course of Loeffler's business. Pursuant to the consulting agreement, Nelson and Loeffler had hundreds of conversations related to Firm matters from January to May 2008.

In May 2008, as the McCain Campaign began to gain momentum, it also began receiving criticism from its opponents regarding the number of highly-placed campaign officials who were also registered lobbyists. In response, the McCain Campaign announced a policy saying campaign personnel could not

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provide lobbying services to clients if they were also working for the campaign. Loeffler understood the campaign decided this: (a) to ensure it had the full-time staffing and professional fundraisers necessary to maintain and build on its momentum; and (b) because it had a political, not legal, concern that lobbyists who also worked on the McCain Campaign created the appearance of a political conflict of interest. The policy was not imposed for legal reasons. The policy was not imposed solely on Loeffler, Nelson, the Firm, or because the Firm had a consulting agreement with Nelson. The policy was imposed across the board and every lobbyist working on the campaign had to make his or her own decision on how to comply with the campaign's new policy.

In response to the McCain Campaign's new policy, Loeffler decided to step aside as General Campaign Co-chairman and National Finance Chairman to devote all his time to the Firm's business. Nelson, on the other hand, decided to devote all of her time solely to the McCain Campaign. Accordingly, Nelson's consulting agreement with the Firm was terminated in May 2008 to comply with Loeffler's decision, Nelson's decision, and the McCain Campaign's new conflict of interest policy.

In May 2008, *Newsweek* published a story by Michael Isikoff based on anonymous sources' mischaracterizing Nelson's association with the Firm and the McCain Campaign. The anonymous sources, and thus Isikoff, incorrectly assumed Nelson had been working full-time for the McCain Campaign throughout 2007 and 2008 and was simply being "subsidiz[ed]" by the Firm. This assumption

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is insulting and wrong. As discussed above, from August 2007 to May 2008, Nelson was routinely and consistently providing professional, valuable, bona fide advisory services directly to Loeffler. She did not begin working exclusively for the McCain Campaign until May 2008.

Since May 2008, Loeffler has returned his full-time attention to the Firm. Loeffler does not interact with Nelson regarding the Firm's clients nor does Nelson provide any professional consulting services to the Firm.

As Loeffler explains in his affidavit, he believed that Nelson and her advice were important, valuable, and trustworthy. Nelson's severance agreement was legal, fair, and necessary to ensure Nelson could assist the Firm for the remainder of 2007. Likewise, the consulting agreement with Nelson was legal, fair, and necessary to ensure Nelson could assist the Firm in 2008. In preparing the severance and consulting agreements, the Firm received the advice of FEC counsel, and at all times, Loeffler believed he was acting in accordance with FEC precedent. Loeffler's intention was to compensate Nelson for the actual bona fide professional advisory services she provided to him on Firm matters.

Statement of Applicable Law

Probably one of the oldest and best-settled precedents in FEC jurisprudence is determining how individuals may be compensated by private entities while working on political campaigns.

In Advisory Opinion 1979-58 (Carter Mondale), the Commission advised a Presidential Committee on whether partners in law firms could volunteer for the

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campaign while receiving compensation from their practices. The Commission found that: when a person has discretion over the use of his or her time, and that no reduction of income from the firm would be made if the partner spent less time on firm matters for whatever reason, then income from the firm would not constitute an in-kind contribution to the campaign.

In reaching this decision, the Commission noted the importance of a person's income not being tied to the number of hours he or she works, but rather is based on a variety of factors such as ownership, seniority of service, stature, ability to attract clients, effectiveness in problem solving and value to other members of the firm. AO 1979-59 at p.2.

Similarly, in Advisory Opinion 1979-22 (Carter Mondale), the Commission approved an arrangement where a compensation schedule arrived between a lawyer, a law firm and Presidential Committee accurately reflected the relative amounts of time the lawyer would devote to his duties on behalf of the law firm and the political committee. AO 1979-22 at p.3.

Consistent with the above, the Commission has also ruled that when compensation is tied to a billable hour system, a firm would be making a contribution to a campaign committee to the extent it failed to reduce an attorney's compensation for reduced time at work. See Advisory Opinions 2000-01 (Taveras), 1980-115 (O'Donnell) and 1978-6 (Gaar). The Commission repeated, however, that when compensation is tied to other factors such as proprietary or ownership interest, seniority of service and the ability to attract clients, the failure

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to reduce compensation would not necessarily be viewed as a contribution to a political committee. See Advisory Opinion 2000-01, *citing* Advisory Opinions 1980-107 (Visser) and 1979-58 (Carter Mondale).

In Advisory Opinion 2004-08 (American Sugar Cane), the Commission addressed the lawfulness of severance packages for individuals running for Congress. Under Commission regulations, compensation such as severance payments will be considered contributions unless:

- (A) The compensation results from *bona fide* employment that is genuinely independent of the candidacy;
- (B) The compensation is exclusively in consideration of services provided by the employee as part of this employment; and
- (C) The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

11 C.F.R. 113.1(g)(6)(iii)

Applying this regulation to the facts in Advisory Opinion 2004-08, the Commission found the severance package to be permissible because it was sufficiently tied to past employment services and was comparable to the compensation that would be offered to similar executives. AO 2004 at p.4-5. The Commission affirmed this analysis in Advisory Opinion 2006-13 (Spivak) when it approved a compensation plan for an equity partner who would work a lesser amount on law firm matters while he was a candidate for Congress. AO 2006-13 at p.5-6.

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In sum, the Commission's jurisprudence is clear. First, individuals may receive severance packages from former employers to become involved in political campaigns so long as the compensation is customary, is paid as a result of bona fide employment in conjunction with services provided, and is in an amount similar to what would be paid any other qualified person. Second, a person need not take a reduction in salary if his or her compensation is not tied, for example, to billable hours but is based on seniority, status, proprietary interest, and the individual's overall worth and value to the firm and its clients.

Taken together, this jurisprudence shows the Firm's severance in 2007 and consulting agreement in 2008 is permissible under FEC law.

Analysis

The analysis of this matter is not complicated: In 2007, Susan Nelson was a full time employee of The Loeffler Group. In July of 2007, she was asked to join the McCain Campaign which would end her full time employment with The Loeffler Group. After seeking advice of FEC counsel, a severance agreement was signed in accordance with FEC law on terms in the ordinary course of The Loeffler Group's business. The agreement provided for payments in accordance with the firm's past practices and Mr. Loeffler's need for ongoing, but less-than-full-time, consulting advice from Ms. Nelson. As stated in the enclosed affidavit, the firm considered this agreement to be fair, lawful and necessary to end Ms. Nelson's employment with the firm and begin her employment with the McCain Campaign.

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The analysis of the facts in 2008 is also not complicated: Mr. Loeffler required the retention of Ms. Nelson to provide him with ongoing advice to maintain his responsibilities to the firm and its clients. The amount of advice he needed was similar to the amount he required in 2007. Accordingly, a simple extension of the payments was proposed. On advice of FEC counsel, a consulting agreement was drafted that all three parties (Nelson, the Firm and the McCain Campaign) deemed to be fair, lawful and necessary.

These actions are consistent with, and in fact were designed to be in accordance with, FEC precedent. The severance agreement is lawful since it was drafted in the Firm's ordinary course of business on terms substantially similar to those offered other employees in recognition of bona fide work. This is absolutely the case here.

The consulting agreement is lawful because it provided compensation for bona fide work given exclusively in consideration of the services provided, it did not exceed an amount that would be given to others in a similar situation, and it was given irrespective of the person's involvement in the campaign.

And finally, Ms. Nelson's regular income was not tied to the number of hours she worked, but instead was reflective of her seniority, leadership, problem solving skills and ability to attract or retain clients. Her employer has a great deal of discretion in determining her salary. Typically, a reduction in income is not required if a person such as Ms. Nelson begins working for a campaign.

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To be sure, Respondent is not claiming Ms. Nelson was volunteering part-time for the campaign or receiving severance to run for Congress as are the facts in the Advisory Opinions cited. Instead Respondent is taking the principles of those Opinions and applying them here: a person may receive severance to begin working on a campaign, and a person may later have a consulting contract while working on a campaign so long as the payments are for bona fide work being done.

Such was the case here. In fact, it is quite possible the Firm's payments to Ms. Nelson under the 2008 consulting agreement would still be continuing today but for the McCain Campaign's political decision to not allow any campaign personnel to receive compensation for any lobbying-related activity.

Commentary and Conclusion

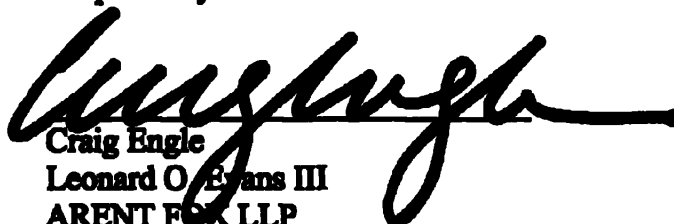
Tom Loeffler is former Member of Congress with over 30 years experience in elections. He has a vast knowledge of business, law, lobbying and campaign finance. He is a man of excellent reputation. The Loeffler Group is one of the most prominent and professional firms in Texas and Washington. It is a firm with an excellent reputation. Senator John McCain is a campaign finance reformer who made a political, and not a legal, decision to separate lobbyists from his campaign in May of 2008.

Newsweek completely based its story on anonymous sources. The Complaint based its allegations completely on *Newsweek's* story.

The Commission should, in our opinion, keep these points in mind as it evaluates the real facts and caselaw to find no reason to believe any violation of law has occurred in this matter.

Respectfully Submitted:

Dated: 31 July 2008



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Counsel for The Loeffler Group, LLP

Newsweek

McCain vs. Lobbyists

Michael Isikoff

NEWSWEEK

Updated: 2:14 PM ET May 17, 2008

Stung by the news that two aides once lobbied for the Burmese junta, John McCain last week rolled out a sweeping new conflict-of-interest policy for his campaign, requiring all staffers to fill out questionnaires identifying past or current clients that "could be embarrassing for the senator." Aides say that McCain was furious over the Burma connection (which he learned from a **NEWSWEEK** story) and was "adamant" about banning campaign workers from serving as foreign agents or getting paid for lobbying work.

But the fallout may not be over. One top campaign official affected by the new policy is national finance co-chair Tom Loeffler, a former Texas congressman whose lobbying firm has collected nearly \$15 million from Saudi Arabia since 2002 and millions more from other foreign and corporate interests, including a French aerospace firm seeking Pentagon contracts. Loeffler last month told a reporter "at no time have I discussed my clients with John McCain." But lobbying disclosure records reviewed by **NEWSWEEK** show that on May 17, 2008, Loeffler listed meeting McCain along with the Saudi ambassador to "discuss US-Kingdom of Saudi Arabia relations."

Another potential problem: Loeffler's firm started paying \$15,000 a month last summer to one of its lobbyists, Susan Nelson, after she left to become McCain's full-time finance director, said a source familiar with the arrangement (who asked not to be identified talking about sensitive matters). Campaign officials were told the payments were "severance" for Nelson and that they ended by November. But in "February or March," Loeffler rehired Nelson as a consultant to "help him with his clients" while she continued on the McCain payroll, according to a campaign official who asked not to be identified talking about personnel matters. Federal election law prohibits any outside entity from subsidizing the income of campaign workers. McCain's officials say they have been assured that Nelson did actual work for Loeffler's lobbying clients—and that the payments were proper. But after **NEWSWEEK** posed questions about the matter, they confirmed Loeffler's resignation and the termination of Nelson's consulting contract. (Loeffler and Nelson did not respond to requests for comment.) Also last week, energy adviser Eric Burgeon was ousted.

If other staffers are not in compliance with the new rules, "they will become so or they will leave the campaign," said McCain spokeswoman Jill Hazelbaker. She also accused the Obama campaign of an "absurd double standard" because it has not disclosed the names of all advisers who may have lobbying ties. Responded Obama spokesman Bill Burton: "Washington lobbyists don't give money to our campaign, and they're not going to run our White House."

URL: <http://www.newsweek.com/id/137522>

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EXHIBIT 1

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MCCAIN CAMPAIGN POLICY

In order to ensure that there are no conflicts of interest between the Campaign and those who are assisting us, the Campaign's policy on the involvement of lobbyists is as follows:

- 1.) No person working for the Campaign may be a registered lobbyist or foreign agent, or receive compensation for any such activity.
- 2.) Part-time volunteers for the Campaign must disclose to the Campaign any status as registered lobbyists or foreign agents. Such persons are prohibited from involvement in any Campaign policy-making on the subjects on which they are registered, including service on policy task forces or participation in policy discussions on those subjects. Such persons are also prohibited from lobbying Senator McCain or his Senate personal office or committee staffs during the period they are volunteering for the Campaign.
- 3.) No person with a McCain Campaign title or position may participate in a 527 or other independent entity that makes public communications that support or oppose any presidential candidate.
- 4.) No vendor to the McCain Campaign may also be a vendor to a 527 or other independent entity that makes public communications that support or oppose any presidential candidate without a pre-approved firewall pursuant to FEC regulations.
- 5.) Senator McCain has also announced that it will be his policy that anyone serving in a McCain Administration must commit not to lobby the Administration during his presidency.

For the purposes of this policy, the following definitions apply:

- 1.) A "person working for the Campaign" means any person:
 - a. who receives compensation from the campaign (whether as an employee or as a consultant); or
 - b. who does not receive compensation but nonetheless serves as a regular Campaign staffer.
- 2.) A "registered lobbyist" is any person required to file a lobbying report under the Lobbying Disclosure Act (LDA) or under the relevant laws of any state.
- 3.) A "registered foreign agent" is any person required to file a registration under the Foreign Agent Registration Act (FARA).
- 4.) A "Part-time volunteer" covered by the policy is a person outside the Campaign who has a Campaign title, a decision-making role, or policy-making responsibilities such as serving as a member of an advisory or policy development committee or task force.

BEFORE THE FEDERAL ELECTION COMMISSION

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In re:

The Loeffler Group

MUR No. 6023

MOTION TO SEVER

Respondent The Loeffler Group (the "Firm"), by counsel, hereby requests that the Commission sever the second claim from the Complaint pursuant to its discretion under 2 U.S.C. § 437g(a)(1), because the second claim is unrelated to the first claim and is not directed against the Respondent.

By the Complainant's own writing, Campaign Money Watch is advancing two completely separate allegations against the John McCain 2008 presidential campaign, but only the first claim affects the Firm. Page 2 of the Complaint states: "Item #1: The Loeffler Group LLP, a Lobbying Firm, may have subsidized a McCain Campaign Staffer's Salary." Page 5 of the Complaint states: "Item 2: the McCain Campaign May Have Received an illegal \$107,475 Corporate Contribution From 3eDC a Company Partly Owned by Rick Davis, The Campaign Manager."

A thorough reading of each separate item indicates the Firm is not mentioned in "Item #2". Moreover, the allegations contained in "Item #2" have no bearing on the Firm.

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The Federal Election Campaign Act states: "Any person who believes a violation of this Act has occurred or of chapter 95 or chapter 96 of Title 26 has occurred, my file a complaint with the Commission." 2 USC § 437g(a)(1).

Although the statute does not make a specific allowance for severance, it does refer to "a violation" in the singular, thereby indicating it would be within the discretion of the Commission to treat each violation as a separate complaint.

Severance, of course, will not be appropriate in every MUR where several violations are alleged, but it is reasonable in this case where the two claims are completely unrelated to one another and the second claim is not even directed to the Firm. By severing the second claim from the Complaint, the Commission will be able to more efficiently dismiss the Firm from this matter.

Accordingly, Respondent moves the Commission sever the allegations in Item #1 and Item #2 into two separate MURS and inform the Respondent of its action. Respondent further requests the Commission take this action at the same time it considers Respondent's Motion to Dismiss.

Dated: July 31, 2008

Respectfully Submitted:



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BEFORE THE FEDERAL ELECTION COMMISSION

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In re:

The Loeffler Group

MUR No. 6023

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MOTION TO DISMISS

Respondent The Loeffler Group (the "Firm"), by counsel, hereby requests the Commission dismiss the complaint pursuant to its power under 2 U.S.C. § 437g(a)(1). The complaint fails to comply with or satisfy the standards to begin enforcement under the Federal Election Campaign Act in two important ways. FEC complaints must be made under penalty of perjury and must identify the source giving rise to the complaint. The Complainant in this case has failed to comply with both requirements.

The Federal Election Campaign Act states: "Before the Commission conducts any vote on the Complaint *other than a vote to dismiss*, any person so notified shall have the opportunity to demonstrate . . . that *no action* should be taken against such person on the basis of the Complaint." 2 U.S.C. §437g(a)(1) (emphasis added).

The Act also states a Complaint "shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18 . . . [and] [t]he Commission may not conduct any investigation or take any other action . . . solely

on the basis of a complaint of a person whose identity is not disclosed to the Commission.” *Id.*

The Complaint in this case has not been sworn to under the penalty of perjury and the basis of the Complaint is a person whose identity is not disclosed. For each of those reasons, the Complaint is procedurally and substantively defective. Accordingly, the Commission should vote to dismiss this case.

A Complaint Must Be Sworn To Under Penalty of Perjury

Section 437g(a)(1) of the FECA states “any person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and *shall be made under penalty of perjury* and subject to the provisions of section 1001 of Title 18.” 2 U.S.C. § 437g(a)(1) (2004) (emphasis added).

Section 111.4 of the Code of Federal Regulations clarifies Section 437g(a)(1) and states: “(b) a complaint shall comply with the following . . . (2) the contents of the complaint shall be sworn to and signed in the presence of a notary public and shall be notarized [and] (c) [a]ll statements made in a complaint are subject to the statutes governing perjury and to 18 U.S.C. § 1001.” 11 C.F.R. §§ 111.4(b)(2), 111.4(c) (2004).

Section 1001 of Title 18, which governs false statements made to a government agency, does not state a standard for determining whether a person has perjured himself or what form a statement must take in order to be made

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“under the penalty of perjury.” 18 U.S.C. § 1001 (2004). But the statute governing unsworn declarations states:

Wherever, under any law of the United States or any rule, regulation, order, or requirement made pursuant to law, any matter is required . . . to be supported, evidenced, established or proved by the sworn declaration, . . . [or] statement, in writing of the person making the same, such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, . . . or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: (2) . . . “*I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).*”

28 U.S.C. § 1746 (2004) (emphasis added). Thus, to be sworn to under the penalty of perjury, an FEC complaint must include the language cited in the declarations statute.

Courts have generally interpreted the language “sworn to” as requiring an oath, affirmation, or statement that the contents of the document are true as set forth therein. *See Kellner v. Christian*, 539 N.W.2d 685, 689 (Wis. 1995).

Further, the presence of a notary public’s certificate is merely evidence the person signing the complaint is in fact who that person purports to be and that the oath or affirmation occurred, but it does not necessarily function as the oath itself. *See id.* (holding “statement may be sworn to without being notarized, just as a statement may be notarized without being sworn”); *Hub City Wholesale Elec., Inc. v. Mik-Beth Elec. Co.*, 621 S.W.2d 242, 243 (Ky. Ct. App. 1981). The Commission should begin following the majority rule.

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Federal courts will defer to an agency's "authority to issue regulations, which then interpret ambiguous statutory terms." *Federal Express Corp. v. Holowecki*, 128 U.S. 1147, 1154 (2008); *see also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984). The Court also held "the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force." *Fed. Express Corp.*, 128 U.S. at 1155; *see also Auer v. Robins*, 519 U.S. 452, 461 (1997) (holding court will accept agency's position unless it is "plainly erroneous or inconsistent with the regulation"). On the other hand, an agency is not entitled to deference if it interprets a statute in a manner contrary to clear congressional intent. *See Chevron*, 467 U.S. at 843.

The Commission's past practice concerning the acceptance of complaints that have not been properly sworn to is an unreasonable interpretation of Section 437g(a) because it is contrary to congressional intent and does not fulfill the Section's express requirements. As discussed above, Section 437g(a), as clarified by 11 C.F.R. § 111.4 and case law, requires a properly "signed and sworn" complaint must include a statement affirming the validity of the contents under the penalty of perjury in addition to a notary public's certificate. *See* 2 U.S.C. § 437g(a) (citing 18 U.S.C. § 1001) (complaints "shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and *shall be made under penalty of perjury* and subject to the provisions of section 1001 of Title 18." (emphasis added)). As the Supreme Court has explained the use of the term "shall" in a statute creates a "discretionless obligation." *Lopez v. Davis*, 531 U.S.

230, 241 (2001). Therefore, Congress's use of "shall" in § 437(g)(a) means a valid FEC complaint must contain all listed elements, including a statement indicating the complaint is being made under the penalty of perjury.

The Commission's informal, and therefore not legally binding, brochures indicate the Commission's practice has disregarded the "penalty of perjury" obligation and has allowed complaints that include a sworn statement *or* a notary public's certificate. See, e.g., Filing a Complaint, *available at* <http://www.fec.gov/pages/brochures/complain.shtml> (last viewed July 9, 2008) (stating for complaint to be considered complete, it must "be signed, sworn to and notarized[,] . . . mean[ing] that the notary public's certificate must say ' . . . signed and sworn to before me . . . ,' or words that connote the complaint was affirmed by the complainant, (such as 'under the penalty of perjury')") (emphasis added). Thus, the Commission's past practice suggests it interprets Section 437(g)(a) to require *either* a sworn statement *or* a notary public's certificate. This is plainly inconsistent with Section 437(g)(a)'s express requirement that a complaint must contain a sworn statement *and* a notary public's certificate. Accordingly, if the Commission accepts complaints without a statement affirming the complainant is filing it under the penalty of perjury, we believe the Commission's practice will not be afforded deference under *Federal Express Corp. v. Holowecki*.

The Complaint filed in this case fails to include the statement is made under the penalty of perjury as is explicitly required by Section 437(g)(a). Because it fails to satisfy that statutory requirement, the Complaint should be dismissed.

A Complaint Cannot Be Based On Anonymous Sources

Section 437g(a)(1) of the FECA creates a private cause of action for anyone who believes a violation of the FECA has occurred. 2 U.S.C. § 437g(a)(1) (2004). Section 111.4 of the Code of Federal Regulations requires a complaint contain a "clear and concise recitation of the facts which describe a violation of the statute" and the complaint "should differentiate between statements based upon personal knowledge and statements based upon information and belief." 11 C.F.R. §§ 111.4(c), 111.4(d)(3) (2004).

Further, Commission regulations explain: "Statements which are not based upon personal knowledge should be accompanied by an *identification of the source of information* which gives rise to the complainant's belief in the truth of such statements" 11 C.F.R. § 111.4(d)(2) (2004) (emphasis added).¹

In this case, the complainant's information and belief is based on anonymous sources included in a news story. Thus, the complainant cannot identify the source of information which gives rise to the complainant's belief. And the complainant cannot give any explanation of the basis for its belief in the truth of such statements. In short, the complainant cannot satisfy the Commission's regulations requiring disclosure of the source of the information relied upon in support of a complaint. Therefore, the Complaint must be dismissed.

¹ For example, the FECA defines "identification" for reporting to mean: "(A) in the case of any individual, the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer; and (B) in the case of any other person, the full name and address of such person." 2 U.S.C. § 431(13) (2004).

Standard for Motion to Dismiss

Pursuant to the exercise of its discretion, the Commission may dismiss a matter when the matter does not merit further use of Commission resources. *See Policy Statement Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (March 16, 2007) (to be codified at 11 C.F.R. pt. 111). Factors that may lead the Commission to dismiss a complaint are the insignificance of the alleged violation, *the vagueness* or weakness of the evidence, likely difficulties with an investigation, or a lack of majority support for proceeding with a matter for other reasons. *Id.* (emphasis added).

Dismissal is appropriate when the seriousness of the alleged conduct is not sufficient to justify the cost and difficulty of an investigation, or when the evidence is sufficient to support a "reason to believe" finding, but the violation is minor. *Id.* The Commission may also dismiss and send a letter admonishing the respondent when a respondent admits to a violation or the Commission concludes that a violation of the Act probably did occur, but the size or significance of the violation is not sufficient to warrant further Commission resources. *Id.*

As the Supreme Court reaffirmed in *Heckler v. Chaney*, 470 U.S. 821 (1985), a government agency has broad discretion to dismiss complaints. *Id.* (holding refusal to exercise enforcement authority involves balancing of factors which are not suitable for judicial review). It is well-settled that "[a] court may not disturb a [FEC] decision to dismiss a complaint unless the dismissal was based

on 'an impermissible interpretation of the [FECA] ... or was arbitrary or capricious, or an abuse of discretion.' " *Common Cause v. Federal Election Com'n*, 108 F.3d at 415 (quoting *Orloski v. Federal Election Com'n*, 795 F.2d 156, 161 (D.C.Cir.1986)). *See also Buchanan v. Federal Election Com'n*, 112 F.Supp.2d 58, 69 -70 (D.D.C. 2000).

The Supreme Court has noted that the Commission "is precisely the type of agency to which deference should presumptively be afforded" because "Congress has vested the [Commission] with the 'primary and substantial responsibility for administering and enforcing [FECA].' " *Federal Election Com'n v. Democratic Senatorial Campaign Comm. ("DSCC")*, 454 U.S. 27, 37 (1981) (quoting *Buckley v. Valeo*, 424 U.S. 1, 109 (1976)). Moreover, as the Supreme Court explained in *Buckley*, Congress has vested the Commission with "primary and substantial responsibility for administering and enforcing the Act, . . . [and] sole discretionary power" to determine in the first instance whether or not a civil violation of the Act has occurred." 424 U.S. at 109, 112 n. 153.

Thus, if the Commission exercises its enforcement discretion here by applying the factors discussed in the March 16, 2007 Policy Statement, a court will likely defer to the Commission's judgment. Simply stated: a complaint based solely on a four-paragraph news article based on anonymous sources is weak and vague, and the Commission should not expend its resources doing the Complainant's job for it.

Analysis

Respondent's counsel believes this new Commission should begin initiating new and higher standards for accepting complaints. In addition to the Complaint's substantive defects noted above, the Commission should be suspicious of "press conference complaints" thrown at the Commission and respondents. Simply put, the Commission should begin a serious examination of a complaint *when it is filed*, to clean up its docket, decrease the General Counsel's workload, and give Respondents confidence that meritless charges can be dismissed quickly.

Second, the standard being leveled at the Respondent should also be applied to the Complainant. When the McCain Campaign and the Firm did not answer the allegations publicly but instead just issued a general denial, the Complainant filed this Complaint because:

"Simply asserting, without evidence, that they have done nothing wrong does not, in our judgment, satisfactorily answer the (allegation)."

Complaint at 1. Well, lets hold this Complaint to its own standard: simply asserting, without evidence, that the Respondent may have done something wrong does not, in our opinion, satisfactorily initiate a Commission investigation.

Third, the Complaint asks the Commission to open a federal investigation based on the following statement alone:

"a source familiar with the arrangement (who asked not to be identified talking about sensitive matters)"... and "according to a campaign official who asked not to be identified."

Complaint at 2. That's it. The whole basis for this complaint are anonymous sources in a news story. There is no indication these people know anything about this matter or are even involved in the campaign.

Fourth, the complaint makes this remarkable statement:

"we are prepared to assist your investigation in any way should you require it, and the news stories are available upon request."

Complaint at 7. Available upon request? This is not a job application. It is an attempt to induce a federal investigation into a respected, former Member of Congress who is a successful lawyer, business man, and volunteer to the McCain campaign. The new Commission must adopt more rigorous procedures to screen out such frivolous complaints.

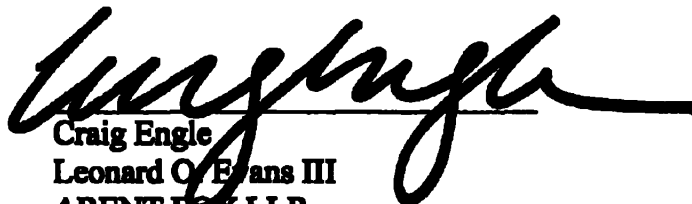
Fifth, this is not a procedural delaying tactic. In fact, this is the best way to promptly resolve this matter because the Complainant cannot cure these defects by re-filing this Complaint with the proper attestation. It is impossible for someone to swear under penalty of perjury that a matter is based on information or a personal belief when the entire case is based on information received third-hand from anonymous sources. Moreover, the Commission must be able to identify the source of these quotes to examine their credibility, but it is unlikely the reporter will disclose his sources to the Commission. Likewise, the Respondent also needs to know the source to fairly confront the witnesses against him, but the reporter is even less likely to volunteer his sources to the Respondent.

Conclusion

Because the Complaint fails to satisfy the most basic standards to beign enforcement procedures under the Federal Election Campaign Act, the Commission should dismiss it without further proceedings. The Complaint is not sworn to under penalty of perjury and it is based on anonymous sources – not personal belief – and is thus insufficient.

Respectfully Submitted:

Dated: July 31, 2008



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BEFORE THE FEDERAL ELECTION COMMISSION

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In re:

The Loeffler Group

MUR No. 6023

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COUNSEL
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MOTION TO SUBMIT RESPONSE UNDER SEAL

Respondent The Loeffler Group (the "Firm"), by counsel, hereby submits this motion to keep its Response to the Complaint in the above-styled matter *under seal*. The Response is timely submitted in the attached sealed envelope. The Respondent moves the Commission not open or consider that Response until after it has considered and resolved the pending Motion to Dismiss.

The Respondent submits this motion for two important reasons. First, Respondent believes the information contained in the Response may prejudice the Commission's consideration of the Respondent's Motion to Dismiss. Second, the Response contains sensitive political opinions and commentary as well as certain proprietary business information that may unfairly prejudice the Respondent's reputation and business affairs unrelated to this matter.

Accordingly, Respondent moves the enclosed Response remain under seal and be returned to the Respondent's counsel if the Commission votes to dismiss this matter.

**The Commission Has Authority to Sequentially Consider
a Motion to Dismiss and then a Response to a Complaint**

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The Commission is empowered to consider the sealed Response only after resolving the Respondent's motion. No court has held an agency would be abusing its discretion by allowing a respondent to submit a procedural motion for consideration prior to the agency considering the response on the merits. There are no statutes and the Commission has not adopted any rules or regulations prohibiting a respondent from submitting motions to be considered before addressing the contemporaneously filed response. Rather, there are rules and regulations which allow the Commission to first consider the Firm's motions regarding the inadequacies of the Complaint before reading the Firm's response regarding the substance of the Complaint.

The Commission has recognized the propriety of relying on the Federal Rules of Civil Procedure in matters concerning subpoenas, depositions, and evidence. *See* 11 C.F.R. §§ 111.12(c), 111.21(c). Such matters are inherently procedural in nature. Likewise, the Respondent's Motion to Dismiss is procedural in nature: it contends the Complaint fails to satisfy the standards necessary to initiate enforcement under the Federal Election Campaign Act. Such a motion is recognized under Fed. R. Civ. P. 12 and courts permit such a motion to be filed and considered before a party is required to answer a complaint. In the same way, the Commission should resolve the Respondent's challenges to the serious facial inadequacies of the Complaint before reviewing the Respondent's substantive response.

Moreover, as a matter of practice, the Commission accepts and considers sequential arguments submitted in response to a complaint. The Firm's Motion to Dismiss which raises procedural arguments, and its Response which address the substance of the Complaint, should be treated in this way.

For example, the Commission has accepted multiple lines of argument in response to complaints. In 1997, FEC accepted a response from the New York State AFL-CIO which made both procedural and substantive arguments. New York State AFL-CIO, Response, MUR 4686, 1-3 (Dec. 1, 1997). There, the New York State AFL-CIO first argued that the complaint "[f]ailed to [c]omply with [f]ederal [r]egulations for a [s]ufficient [c]omplaint" and, only afterwards did it reply to the substantive allegations pending against it. *Id.* In 1996, FEC accepted and considered multiple arguments in a Democratic National Committee ("DNC") response. Democratic National Committee, FEC Response, MUR 4407 (Aug. 16, 1996). In its first line of argument the DNC stated that "[t]he [c]omplaint [f]ails to [m]eet the [r]equirements for a [v]alid [c]omplaint [u]nder 11 C.F.R. § 111.4[.]" *Id.* at 3. This section only addressed the procedural deficiencies of the complaint. *Id.* Only later, in its second and third arguments, did the DNC address the substantive issues raised by the complaint. *Id.* at 8-12. Tellingly, in the January 1998 First General Counsel's Report in that matter, the Commission noted it considered and discussed both these arguments sequentially in the order they were presented. Federal Election Commission, First General Counsel's Report, MUR 4407 & 4544, 15-45 (Jan. 6, 1998). Thus, the Commission has set a precedent of

accepting and sequentially considering both procedural and substantive arguments in responses. See Federal Election Commission, First General Counsel's Report, MUR 4407 & 4544, 15-45; see New York State AFL-CIO, Response, MUR 4686, 1-3; see Democratic National Committee, FEC Response, MUR 4407, 3-12.

The Firm's request today is no different, except the procedural arguments are more formally presented in a Motion to Dismiss filed independent of the substantive Response. As such, it would be in keeping with the Commission's practice to grant the Respondent's request and rule on the Motion to Dismiss before analyzing the Response.

**The Substantive Response Must be Kept *Under Seal*
Until the Motion to Dismiss is Resolved**

The Commission has a long and admirable history of taking politics out of the discharge of its duties. Although Commissioners are appointed on the basis of their party affiliation, each member has properly hesitated at having the government interfere in political affairs.

The Commission also respects the boundaries of its jurisdiction. Just as it zealously guards the enforcement of campaign finance law from encroachment by other agencies, it also knows it does not regulate lobbying activity or commercial activity completely unrelated to campaign finance.

Lastly, the Commissioners have always been cautious about letting anyone inside the agency view the private, political thoughts of campaign volunteers, or the success, failure, and future planning of an individual's confidential business and legal ventures. This is especially true when this sensitive information has to

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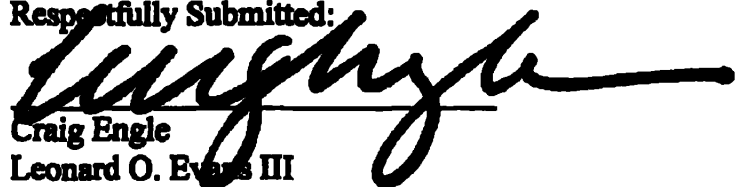
be provided to respond to insensitive, unsubstantiated political charges. This concern remains even though the enforcement process is confidential and the material may be redacted from the public record. Simply put, *any* governmental examination of a person's political views, reputation, and legitimate business and legal affairs must be done only for compelling reasons. As is explained in the Motion to Dismiss, such reasons are noticeably absent from this case.

Conclusion

The Respondent's affidavit in this matter includes personal, confidential, and political information. It is not necessary for the government to view these unless it absolutely must. Accordingly, the fairness due The Loeffler Group and the affiant Tom Loeffler must include keeping his and his Firm's Response sealed unless the Commission does not grant the Respondent's Motion to Dismiss.

Dated: July 31, 2008

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